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Bacik bin Abd Rahman v Public Prosecutor

HIGH COURT (MUAR) — CRIMINAL APPEAL NO 42–2 OF 2003
JEFFREY TAN J
5 SEPTEMBER 2003

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Criminal Procedure — Sentence — Plea of guilty — Seriousness of offence — Judicial time and cost saved — Whether plea of guilt considered a mitigating factor to entitle a discount in sentence — Whether sentence appropriate

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Criminal Procedure — Sentence — Concurrent of consecutive — Pleaded instant term of imprisonment to be concurrent with previous term of imprisonment in separate offence — Court's discretion — Whether both sentences to run concurrently or consecutively

The appellant was charged for an offence of rape under s 376 of the Penal Code. He had pleaded guilty in the trial court. This was his appeal against the sentence of 18 years' imprisonment. Prior to this, the appellant had committed

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a separate offence of rape with a term of imprisonment of 16years imposed by the Muar Sessions Court No 62–52–01. The issues to be determined were: (i) whether the sentence was appropriate; and (ii) whether both sentences in both offences should run concurrently or consecutively.

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Held, reducing the term of imprisonment to 15 years and imposing a consecutive term of imprisonment on both offences:

(1) In the instant case, the trial court had taken into account the fact that by pleading guilty, the appellant had saved much judicial time and also not failed to take into consideration the seriousness of the offence and the necessity to protect the public. However, the trial court had failed

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to consider that by pleading guilty, the appellant was entitled to a discount of the sentence and should be treated as a mitigating factor. Therefore, the term of imprisonment was reduced to 15 years, which was three-quarters of the maximum term of imprisonment (see paras 6, 8); *Sau Soo Kim v PP* [1975] 2 MLJ 134; *PP v Ravindran* [1993] 1MLJ 45 and *Mohamed Abdullah Ang Swee Kang v PP* [1988] 1 MLJ

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167 followed.

(2) The law regarding the position of a prisoner who has received more than one sentence of imprisonment is found in s 292 of the Criminal Procedure Code which gives a discretion to the court, depending on the facts and circumstances of each particular case, to order the commencement

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of the sentence either immediately or at the expiration of the imprisonment to which the prisoner had been previously sentenced. Here, the trial court ordered the instant sentence to commence from the expiration of the sentence in Muar Sessions Court No 62–52–01. The appellant was a real threat to the public which must be protected. Aconcurrent term of imprisonment would effectively result in the

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appellant not being imprisoned at all for the second offence and that would do injustice to the instant victim. Thus, the order for a consecutive sentence was good and justifiable (see paras 11-12).

[**Bahasa Malaysia summary**

Perayu telah dituduh untuk kesalahan merogol di bawah s 376 Kanun Keseksaan. Beliau telah mengaku bersalah di mahkamah perbicaraan. Ini adalah rayuan beliau terhadap hukuman 18 tahun penjara. Sebelum ini, perayu telah melakukan satu kesalahan merogol yang berasingan untuk tempoh penjara selama 16 tahun yang dikenakan oleh Mahkamah Sesyen Muar No 62–52–01. Persoalan-persoalan yang perlu ditentukan adalah: (i) sama ada hukuman tersebut sesuai; dan (ii) sama ada kedua-dua hukuman dalam kedua-dua kesalahan hendaklah dilaksanakan serentak atau berturutan.

Diputuskan, mengurangkan tempoh penjara kepada 15 tahun dan mengenakan tempoh penjara yang berturutan ke atas kedua-dua kesalahan:

(1) Dalam kes semasa, hakim perbicaraan telah mengambilkira fakta bahawa dengan membuat pengakuasn bersalah, perayu telah menjimatkan masa kehakiman dan juga mengambilkira keseriusan kesalahan tersebut dan keperluan untuk melindungi orang awam. Namun begitu, mahkamah perbicaraan telah gagal untuk mengambilkira dengan membuat pengakuan bersalah, perayu berhak mendapat pengurangan hukuman dan sepatutnya dianggap sebagai faktor peringanan. Oleh itu, tempoh penjara dikurangkan kepada 15 tahun, iaitu tiga perempat daripada tempoh penjara makisima (lihat perenggan-perenggan 6, 8); *Sau Soo Kim v PP* [1975] 2 MLJ 134; *PP v Ravindran* [1993] 1 MLJ 45 dan *Mohamed Abdullah Ang Swee Kang v PP* [1988] 1 MLJ 167 diikut.

(2) Undang-undang berkaitan kedudukan banduan yang dikenakan lebih daripada satu hukuman penjara didapati dalam s 292 Kanun Acara Jenayah yang memberikan budi bicara kepada mahkamah, bergantung kepada fakta-fakta dan keadaan-keadaan setiap kes, untuk memerintahkan bermulanya hukuman sama ada dengan segera atau selepas tamat tempoh penjara yang dijalani banduan untuk hukuman sebelumnya. Di sini, mahkamah perbicaraan telah memerintahkan hukuman semasa dimulakan selepas tamat hukuman dalam Mahkamah Sesyen Muar No 62–52–01. Perayu adalah merbahaya kepada orang awam yang patut dilindungi. Satu tempoh penjara yang serentak akan menyebabkan perayu tidak dipenjarakan langsung untuk kesalahan kedua dan adalah tidak adil kepada mangsa dalam kes ini. Oleh itu, perintah untuk hukuman berturutan adalah betul dan dijustifikasikan (lihat perenggan-perenggan 11–12).]

Notes

For cases on concurrent or consecutive sentences, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2967–3000 .

For cases on plea of guilty, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3312–3336 .

Cases referred to

Amira Lai Hazra v Emperor 42 Cal 952 (refd)
Ang Chai Seng v PP [2000] 2 MLJ 35 (refd)
Bhandulananda Jayatilake v PP [1982] 1 MLJ 83 (refd)
Chin Choy v PP [1955] MLJ 236 (refd)
Dato' Seri Anwar bin Ibrahim [2002] 3 MLJ 193 (refd)
Hyder v Rex [1949] MLJ 121 (refd)
Jamieson v Jamieson [1952] AC 525 (refd)
Maideen Pillai v PP [1996 1 SLR 161 (refd)
Mohamed Abdullah Ang Swee Kang v PP [1988] 1 MLJ 167 (folld)
Ooi Sim Yim v PP [1990] 1 MLJ 88 (refd)
PP v Loo Choon Fatt [1976] 2 MLJ 256 (refd)
PP v Ooi Wang San [1998] 2 MLJ 765 (refd)
PP v Ravindran [1993] 1 MLJ 45 (folld)
PP v Yap Huat Heng [1985] 2 MLJ 414 (refd)
R v Kenneth John Ball 35 Cr App R 164 (refd)
Sau Soo Kim v PP [1975] 2 MLJ 134 (folld)

Legislation referred to

Criminal Procedure Code ss 282(d), 288, 292
Penal Code s 376
Subordinate Court Act 1948 s 64

Appeal from: Criminal Trial No 62–15 of 2002 (Sessions Court, Muar)

Bachik bin Abd Rahman representing himself as the appellant.
Haslinda bte Abu Bakar (Attorney Generel's Chambers) for the respondent.

Jeffrey Tan J:

[1] The appellant had pleaded guilty in the trial court to the following offence:

> Bahawa kamu pada 19.9.2001, di antara jam 6.45 petang hingga 8.45 malam di Kawasan Kebun Kelapa Sawit Ladang Felcra, Bt 19, Air Hitam, Muar, di dalam daerah Muar, di dalam Negeri Johor telah merogol seorang kanak-kanak perempuan Melayu bernama Rabaitul Adawiyah bte Sulaiman, (Tarikh Lahir 29 Januari 1990). Oleh yang demikian, kamu telah melakukan satu kesalahan yang boleh dihukum di bawah s 376 Kanun Keseksaan.

[2] And this is the appellant's appeal against the sentence of 18 years' imprisonment and 12 strokes of the rotan handed down by the trial court on 14 January 2003.

[3] A sessions court may pass any sentence allowed by law other than the sentence of death' (s 64 of the Subordinate Court Act 1948). The permissible punishment for rape is imprisonment for a term of not less than five years and not more than 20 years; an offender shall also be liable to whipping. Section 376 does not specify the number of strokes. But in no case shall the whipping exceed 24 strokes in the case of an adult or ten strokes in the case of a youthful offender (see s 288 of the Criminal Procedure Code). Hence, the sentence of the trial court was within the permissible range. But an

appellate court may interfere with the sentence, even if the sentence is within the permitted range. '... the appellate court is ready to interfere with the sentence imposed by the trial court upon proof of one or more of the following circumstances: (a) the sentence imposed by the trial court was manifestly excessive or inadequate; (b) there is a manifest error either in law or in considering the facts and circumstances of the case; (c) the sentence passed by the trial court is manifestly wrong in the sense of being illegal or of being unsuitable to the proved facts and circumstances; (d) the trial court has given undue weight to some of the evidence; (e) the trial court, in fixing the sentence, had failed to adequately consider all the relevant factors either for or against the *offender*; (f) the sentence was wrong in law; (g) the unsatisfactory features of the proceedings in the lower court; (h) the charge has been hanging over the accused's head for a considerable period; (i)justice does not appear to have been done.' (*Civil and Criminal Appeals in Malaysia* by Tan Kee Heng at pp 191–192). Yet It is 'a firmly established principle that an appellate court would be slow to disturb the sentence imposed by the lower courts unless the sentence is excessive to such an extent as to satisfy this court that when it was passed there was a failure to apply the right principles then this court will intervene' *(R v Kenneth John Ball* 35 Cr App R 164). According to Hashim Yeop Sani J (as he then was) in *PP v Loo Choon Fatt* [1976] 2 MLJ 256 at p 257G: 'It is a firmly established practice that the court will not alter a sentence merely because it might have passed a different sentence' (see *Ang Chai Seng v PP* [2000] 2MLJ 35 per Haidar JCA (as he then was)). And the Court of Appeal in *Ang Chai Seng* reiterated what was said by the Federal Court in *Bhandulananda Jayatilake v PP* [1982] 1 MLJ 83, at p 84:

> ... this court has said it again and again that it will not normally interfere with sentences, and the probability or even the possibility, that another court would have imposed a different sentence is not sufficient, per se, to warrant this court's interference. For a discretionary judgment of this kind to be reversed by this court, it must be shown to our satisfaction that the learned judge was embarking on some unauthorized or extraneous or irrelevant exercise of discretion.

[4] In *Bhandulananda Jayatilake*, the Federal Court per Raja Azlan Shah Ag LP (as HRH then was) imparted the following guide:

> Is the sentence harsh and manifestly excessive? We would paraphrase it in this way. As this is an appeal against the exercise by the learned judge of a discretion vested in him, is the sentence so far outside the normal discretionary limits as to enable this court to say that its imposition must have involved an error of law of some description? I have had occasion to say elsewhere, that the very concept of judicial discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred. That is quite inevitable. Human nature being what it is, different judges applying the same principles at the same time in the same country to similar facts may sometimes reach different conclusions (see *Jamieson v Jamieson* [1952] AC 525). It is for that reason that some very conscientious judges have thought it their duty to visit particular crimes with exemplary sentences; whilst others, equally conscientious, have thought it their duty to view the same crimes with leniency. Therefore, sentences do vary in apparently similar circumstances with the habit of mind of the particular judge.

A Itis for that reason also that this court has said it again and again it will not normally interfere with sentences, and the possibility or even the probability, that another court would have imposed a different sentence is not sufficient per se to warrant this court's interference.

[5] The latter is still the guide to follow (see *Dato' Seri Anwar bin Ibrahim* [2002] 3 MLJ 193, where the Federal Court expressed its full agreement with *Bhanduiananda Jayatilake)*.

[6] In the instant case, the trial court had certainly taken into account the fact that by pleading guilty the appellant had saved much judicial time and costs. The trial court had also not failed to take into consideration the seriousness of the offence and the necessity to protect the public. Briefly stated, the appellant had forcibly raped a primary 6 schoolgirl whom the appellant with his car from the rear had first knocked off her bicycle and then forcibly abducted her to the scene of the crime. No question about it, the trial court was absolutely right about the seriousness of the offence, and a deterrent sentence was entirely in order. But what would have been the appropriate sentence? According to the trial court, the instant offence warranted a maximum sentence. That would seem to have been so. Nevertheless, it would appear that the trial court had failed to consider that by pleading guilty, the appellant was entitled to a discount of the sentence that would have been imposed if he had not pleaded guilty but found guilty. 'Whether a person is a hardened criminal or not, ... a plea of guilty should be treated as a mitigating factor. It not only saves the country a great expense of lengthy trial but also saves time and inconvenience of many, particularly the witnesses' (*Sau Soo Kim v PP* [1975] 2 MLJ 134, at p 137 per Lee Hun Hoe CJ (Borneo)). As observed by Visu Sinnadurai J in the oft-quoted case of *PP v Ravindran* [1993] 1 MLJ 45, at p 51, 'It is an accepted rule of practice that an accused person should be given credit or discount for pleading guilty. The rationale for this rule is that much public time and money will be spared if an accused admits his guilt, thus avoiding a prolonged and unnecessary trial'. And as further observed by Visu Sinnadurai J, 'The general rule that an accused person who pleads guilty is entitled to a discount was applied by our Supreme Court in *Mohamed Abdullah Ang Swee Kang v PP*. The Supreme Court adopted with approval the views expressed by Cummings-Bruce LJ in R v Boyd where he said: The policy of the court is that where a man does plead guilt, which does give rise to public advantage and avoids the expense and nuisance of a trial, which may sometimes be a long one, the court encourages pleas of guilty by knocking something off the sentence which would have been imposed if there had not been a plea of guilty'.

[7] In *Mohamed Abdullah Ang Swee Kang v PP* [1988] 1 MLJ 167 at p170, Mohamed Azmi SCJ imparted the following guide:

I In assessing the length of custodial sentence, the court must look at the overall picture in perspective by considering, firstly, the gravity of the type of offence committed; secondly, the facts in the commission of the offence; thirdly, the presence of absence of mitigating factors, and fourthly, the sentences that have been imposed in the past for similar offences to determine the trend of sentencing

policy, if any. The fact that a sentence of imprisonment is imposed as a deterrence does not justify the sentencer in passing a sentence of greater length than what the facts of the offence warrant. The gravity of the type of offence involved must be considered in the light of the particular facts of the offence. As stated by James LJ in *R v Ladd & Tristam*:

> 'We have to look at the overall picture of what is the right sentence for the total involvement, the total degree of criminality involved, and we have to keep the sentences in perspective with the sentences that have been passed on other occasions for offences involving criminal activity of this kind, though of course varying in their gravity. Clearly a deterrent element has to be involved, but because the offences are very serious, it does not necessarily follow that on the particular facts very long sentences are justified.'

A sentencer must give sufficient discount for all extenuating circumstances pertaining to the degree of culpability or criminality involved, which must necessarily vary from case to case apart from other mitigating factors. Unless there is a proper reason for withholding such credits, failure to do so may result in the sentencer not exercising his or her discretion judicially in assessing the level of custodial sentence. In *R. v Meade*, a young man who pleaded guilty to arson was granted a reduction in his sentence of six years' imprisonment in what would otherwise have been the proper sentence for such a serious offence. In the course of his judgment, Lord Lane C.J said:

> 'A team of five to six years, whatever the age of the offender may be, is in many cases of using a petrol bomb a perfectly appropriate sentence, because these weapons are rightly called bombs. They can cause the most fearful injuries and this case demonstrates the sort of damage they can cause to property. But having said that, the help that he gave to the police and his plea of guilty earn him a discount, which does not proper to have been given by the judge.
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> It is generally accepted that the extent of the reduction on account of a plea of guilty would be between one-quarter and one-third of what otherwise would have been the sentence.'

[8] If there had not been a plea of guilty but a finding of guilt after trial, 20 years was the maximum term of imprisonment that could have been imposed. If 20 years would have been the term of imprisonment, then at the most, on account of the plea of guilty, the appellant could only be sentenced to a term of imprisonment of 13–15 years. But no credit or discount or no real credit or real discount was given to the appellant for pleading guilty. As a matter of fact, the subject of credit or discount for pleading guilty was somehow forgotten altogether. And that lapse should be put right. The term of imprisonment is therefore reduced to 15 years, which is three-quarters of the maximum term of imprisonment. The appellant who appeared in person made out no case deserving anything less.

[9] The appellant pleaded for the instant term of imprisonment to be concurrent with the term of imprisonment of 16 years imposed by the Muar Sessions Court No 62–52–01 for a separate offence of rape committed on a different date (14 October 2001) against a slightly older victim but whom the Appellant in similar fashion had also forcibly abducted from the street

and then forcibly raped (for the facts in Muar Sessions Court No 62–52–01, see Muar High Court No 42–46–2002).

[10] The law regarding the position of a prisoner who has received more than one sentence of imprisonment is found in ss 282(d) and 292 of the Criminal Procedure Code. 'The effect of these sections is that unless the court imposing the sentence says anything to the contrary, the sentence runs from the date on which it was passed. If it is intended that it should run not from the date it was passed, but from the expiration of some other sentence whether by the same court at the same time or imposed by another court or at any time, then the court must make an order accordingly. If this is done, it should be done at the time the sentence is imposed' (Practice Note No 7 of 1961; see *also Ooi Sim Yim v PP* [1990] 1 MLJ 88). '[Section 292] gives a discretion to the court, depending on the facts and circumstances of each particular case, ... to order the commencement of the sentence ... . Either immediately or at the expiration of the imprisonment to which [the prisoner] has been previously sentenced' (see *PP v Ooi Wang San* [1998] 2MLJ 765, per Shaik Daud Md Ismail JCA). One or the other, the court awarding the sentence must give its direction. But 'sentences should not be ordered to run consecutively unless there are some good grounds for so doing' (see *Hyder v Rex* [1949] MLJ 121, per Gordon-Smith Ag CJ). Unless there are reasonable grounds for directing otherwise, 'sentences of imprisonment should run concurrently where it is reasonable to conclude that the second charge is really subsidiary to the first charge' (see *Ooi Sim Yim v PP* and *PP v Yap Huat Heng* [1985] 2 MLJ 414) or where offence are committed in the course of a single transaction (see *Maideen Pillai v PP* [1996 1 SLR 161). 'It is not possible to frame a comprehensive formula of universal application to determine whether two of more acts constitute the same transaction; but circumstance which bear on the determination of the question in an individual case may easily be indicated: they are proximity of time, unity or proximity of place, continuity of action and continuity of purpose or design' (see *Amira Lai Hazra v Emperor* 42 Cal 952; in *Chin Choy v PP* [1955] MLJ 236, the Court of Appeal held that the best test which has been laid down in considering the matter is contained *in Amira Lai Hazra v Emperor*).

[11] The trial court ordered the instant sentence to commence from the expiration of the sentence in Muar Sessions Court No 62–52–01, giving the following reason:

> Pada pandangan Mahkamah nampaknya penglibatan OKT di dalam jenayah adalah lebih kepada kesalahan seksual yang kejam. OKT sekiranya tidak dibendung perbuatannya ini dari awal lagi maka kemungkinan besar beliau akan melakukan kesalahan yang sama terhadap mangsa-mangsa yang berlainan pada masa hadapan. Oleh itu amatlah berbahaya sekali kepada masyarakat umum sekiranya penjenayah seperti OKT ini diteruskan untuk bergaul dikalangan masyarakat umum kerana beliau mempunyai keupayaan dan potensi untuk melakukan kesalahan ini beberapa kali pada masa depan dengan akibat yang lebih teruk kepada mangsa-mangsanya. Tidaklah keterlaluan sekiranya mahkamah menganggap OKT mempunyai ciri-ciri seorang perogol bersiri (serial rapist) yang menjadi masalah besar kepada polis dan ketenteraman awam pada masa kini.

[12] Those comments were strong, but were not without reasonable basis. Rape is a heinous crime which must be severely punished. And in the case of both rapes committed by the appellant, they were most primordial. The appellant was just a savage. In both cases, he just snatched young and defenceless girls from the streets and raped them. The trial court was not wrong to say that the appellant was a real threat to the public, and to young girls in particular. The public must be protected. There was certainly good and justifiable reason to order a consecutive sentence. In any event, both offences were unrelated. A concurrent term of imprisonment would effectively result in the appellant not being imprisoned at all for the second offence. And that would not do any justice to the instant victim who would surely have to bear forever the ugly memory of rape, if not any of the undeserved stigma of rape. Each rape must be punished. This is certainly not a case to disturb the order of a consecutive sentence.

Term of imprisonment reduced to 15 years and a consecutive term of imprisonment on both offences imposed.

Reported by Ezatul Zuria Azhari